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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased,

Appellee.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLEE, CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

ANDREW F. VAN THUN, JR.,
Attorney for Appellee,
Chase L. Day, executor, etc.

ANDREW F. VAN THUN, JR.,
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Of Counsel.

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BRIEF OF APPELLEE, CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

I.

THE OPINIONS OF THE COURT BELOW.

The opinion in the Surrogate's Court is reported in 171 Misc. 612 (R., 23).

The opinion in the Appellate Division is reported in 258 App. Div. 596 (R., 42).

The opinion in the Court of Appeals is reported in 284 N. Y. 527 (R., 49).

II.

STATEMENT.

In the statement of the case made in the brief of the appellants, Irving Trust Company and another, it is stated that the instrument in question is in "script," but fails to state that the instrument is not holographic, except the signature thereon of Helena Day Snyder, as was admitted on the trial (R., 20).

It is also stated in the said brief (pages 6, 7) that, "The Court of Appeals did not disagree with the findings or opinion of the Appellate Division, except its conclusion that the statute is repugnant to the Constitution of the United States, and invaded contract rights which vested in the testator prior to its enactment." The Appellate Division made no findings of fact; stated that the facts were not in dispute, and "they were contained in the pleadings, certain stipulations, and two documents" (R., 42). The Court of Appeals did not state that it agreed with the grounds of reversal advanced by the Appellate Division, but on the contrary stated, "We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument executed in 1922 in contemplation of marriage, contractual rights protected by the Constitution of the United States, which had been invaded by the new statute" (R., 52).

In the appellants' brief, at page 5, it is stated that, "A motion for judgment on the pleadings was made by all parties (Papers on Appeal, *In re McGlone's Will*, 256 App. Div. 1074), and that the order denying the motion was affirmed by the Appellate Division, but that court reversed the Surrogate on the law of the case," and then quotes part of the opinion of the Appellate Division. The appellants omit quoting the last sentence of the opinion which reads: "The burden of proof on the whole case is upon the petitioners-

appellants, and the widow is not required to go forward with evidence unless and until the petitioners-appellants have made out a prima facie case under the pleadings as they now stand." The Appellate Division on the second appeal from the decree of the Surrogate, after hearing the case, states that, "These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject" (R., 46).

We respectfully submit that the specification of errors made by said appellants in their brief (page 7) are without merit and do not require consideration by this court, except as to those numbered "b" and "d."

This court, in deciding the motion by the appellee for the dismissal of the appeal for lack of jurisdiction, handed down the following memorandum on May 12, 1941: "In this case probable jurisdiction noted. Further consideration of motion to dismiss is postponed to the hearing of the case on the merits."

ARGUMENT.

POINT A.

THE APPELLANTS FAIL TO PRESENT ANY QUESTION FOR REVIEW AND DETERMINATION BY THIS COURT, ARISING UNDER SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES AND SECTION 1 OF THE FOURTEENTH AMENDMENT THERETO.

(a)

The execution by the decedent, John J. McGlone, of the codicil to his last Will and Testament, after August 31, 1930, had the legal effect, under the law of New York, of making a *new* will, operative under the provisions of Section 18 of the Decedent Estate Law, and gave his wife, as the surviving spouse, a "personal right of election" to take her share of the estate of her husband "as in intestacy," because

the decedent failed to make a "testamentary gift of an equal sum with the intestate share, or a gift in trust of such a sum for the use of the surviving spouse for life, or a combination of such gifts providing in the aggregate at least such a sum" that would constitute an equivalent of the intestate share. The decedent herein made a testamentary gift of $2,000.00 to his wife, though his estate amounted to the appraised value of $236,852.74 (R., 24, 32).

Matter of Greenberg, 261, N. Y. 474, 478;
Matter of Byrnes, 260 N. Y. 465, 470;
Decedent Estate Law, Section 2.
Matter of Lavine, 167 Misc. (N. Y.) 879, 881-882.

The statutory personal right of election given to the widow of the decedent, having been exercised by her in pursuance to the statute, entitled her to reject the provision of the will made in her favor and to enjoy the rights in the estate of her deceased husband provided for her by said Section 18 of the Decedent Estate Law. This personal right given to the widow was an absolute right, and could not be waived by her except in the manner provided in subdivision 9 of said section 18.

Matter of Byrnes, 260 N. Y. 465, 469, 470, 472;
Matter of Greenberg, 261 N. Y. 474, 478, 479;
Matter of Clark, 275 N. Y. 1, 5.

It is claimed by the appellants that the instrument executed by Helena Day Snyder on February 2, 1922, two days before her marriage to John J. McGlone, is a bar to her right to elect to take her intestate share in the decedent's estate, as against his will.

The instrument does not bar the right of the surviving spouse to elect to take against the will of the decedent. Subdivision 9 of said section 18 provides for three distinct methods of waiver: (1) Waiver as to a *particular* will by an *instrument* subscribed and duly acknowledged. (2) Waiver as to *any* will by an *agreement* so executed made

before or after marriage, and after the effective date of the section. (3) Waiver by an *agreement so executed made before the taking effect of this section* wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section. In the present instance we are concerned with the third case (italics ours). The instrument in question, not being acknowledged, does not comply with the specification of the statute.

(b)

The further question now arises whether the said instrument executed and delivered by Helena Day Snyder to John J. McGlone, on the "eve" of their marriage, created any contractual or property rights in favor of John J. McGlone which have been impaired or destroyed by the subsequent enactment of Section 18 of the Decedent Estate Law.

The Court of Appeals in its opinion assumed, "without now deciding or even considering such questions further, that the instrument of waiver though unilateral in form, evidences a 'contract made between persons in contemplation of marriage,' within the meaning of Section 53 of the Domestic Relations Law; that it is executed in manner which satisfied the requirements of Section 31 of the Personal Property Law; and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law"; and then put the question, "What are those contractual or property rights which it is said are destroyed by the new statute?" The court answered the question as follows:

> "Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of

the estate of her 'husband to be' which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver. The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she

would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right" (R., 52, 53).

In the case of *United Firemen's Insurance Co.* v. *Thomas*, 82 Fed. 406 (U. S. Cir. Ct., 7th C.), a waiver is defined as follows:

> "Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. Bishop, Contr. sec. 792. But manifestly there can be no waiver of a non-existing right,—of that which does not exist."

And in *McCarty* v. *Piedmont Mutual Insurance Company*, 81 S. C. 152 (62 S. E. Rep. 1), waiver is defined as follows:

> "Waiver generally involves the relinquishment of a known or existing right. Estoppel by misrepresentation generally involves some misrepresentation of a past or existing fact. Hence, generally, representations *de futuro* do not form the basis of waiver or estoppel." (And the court cites *Union Mut. L. Ins. Co.* v. *Mowry*, 96 U. S. 546, as a leading authority on the subject.)

In New York, a waiver has been defined, in *Davison* v. *Klaess*, 280 N. Y. 252, 261, as follows:

> "Waiver is 'voluntary and intentional relinquishment or abandonment of a known existing, legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed' (67 C. J. 289; *Masons' Supplies Co.* v. *Jones*, 58 App. Div. 231; affd. 172 N. Y. 598)."

See, also:

Clark v. *West*, 193 N. Y. 349, 360;
Alsens A. P. C. Works v. *Degnon Cont. Co.*, 222 N. Y. 34, 37;

Lord Const. Co. v. *Edison P. C. Co.*, 234 N. Y. 411, 415;
Jonas v. *City of West Palm Beach*, 76 Fla. 66 (79 So. Rep. 438).

The Surrogate fully considered the question of waiver in his opinion herein (R., 31).

At the time of the execution and delivery of the said instrument by Helena Day Snyder, and at the time of the making of his will, executed August 21, 1930, John J. McGlone had the right given him by common and statutory law of the State to dispose of all his property to strangers, except he could not deprive his wife of the right of dower in any real property of which he was seized during the marriage; and thus his wife, if he had died previous to September 1, 1930, would have had no right to share in his estate, except to the extent of the right of dower in the real property of which he might have died seized.

Decedent Estate Law, sections 10, 15;
Opinion of the Court of Appeals herein (R., 50, 51).

(c)

The said instrument, assuming it to be an ante-nuptial contract, gave John J. McGlone no greater right to dispose of his personal property or estate by will than he already had by law. The instrument was not operative, as a jointure, nor as a bar by pecuniary provision, to deprive his intended wife of any right of dower in the real property of which he might have been seized during marriage.

N. Y. Real Property Law (Laws of 1909, chap. 52, art. 6) sections 190, 197, 198;
Graham v. *Graham*, 67 Hun 329; affd. 143 N. Y. 573.

The right to make testamentary disposition of one's property is a creature of statute.

Matter of Bergdorf, 206 N. Y. 309, 316;
Matter of Watson, 226 N. Y. 384, 395; reviewed and affirmed in 254 U. S. 122;

United States v. *Perkins*, 163 U. S. 625, 627;
Mager v. *Grima*, 8 How. (U. S.) 490, 493;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

(d)

While the Court of Appeals assumed that the instrument was a contract made in contemplation of marriage, and held that no contractual or property rights arose from it which were destroyed by the subsequent enactment of Section 18 of the Decedent Estate Law, we will also approach the constitutional question from the angle that the instrument is not a contract from which arose any obligation on the part of the wife to renounce any rights in her husband's estate, nonexistent at its date and not even resting in expectancy, to which she might have become entitled pursuant to the statutory law of New York enacted subsequently to the date of the instrument. It would seem impossible that a statutory right which did not exist at the time the instrument was executed could be waived, renounced, released, or transferred by an instrument such as the one in question. The public policy actuating the Legislature in enacting Section 18 of the Decedent Estate Law, and also abolishing the rights and estates of dower and curtesy in the future, was stated by Chief Judge Pound of the Court of Appeals, in the *Matter of Greenberg*, 261 N. Y. at page 478, as follows:

> "After September 1, 1930, the absence of protection to the widow under prior laws gave way to the widow's right of election to take a specific part of the estate against the will. The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases."

The legislation was a radical departure from the existing common and statutory law of New York as to the descent

and distribution of property and the right of testamentary disposition as to a surviving spouse. The right given to a surviving spouse to take against the will of the deceased spouse made after the enactment of the statute is absolute unless waived in the manner provided by subdivision 9 of section 18 of the same statute.

(e)

Aside from the fact that the instrument was not acknowledged, it is not an agreement or contract within the constitutional provision forbidding a State from passing any law impairing the obligations of contracts. A contract must be clearly proved before it invokes the protection of the Federal Constitution.

> *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625, 630;
> *Crane* v. *Hahlo*, 258 U. S. 142, 145;
> *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 667.

The instrument is not under seal. It is unilateral and gratuitous in character. On its face it does not show consideration of any nature given by the prospective husband to the prospective wife and none can be implied; nor does it show any settlement of marital rights based upon any valuable consideration. It is not instinct with obligation on the part of the prospective wife of such a nature that a breach of it would result in detriment to the prospective husband. The prospective wife was not benefited by any promise given or consideration furnished by the prospective husband. It professes to embrace and to renounce rights which the prospective wife would not acquire by the marriage, for the existing law gave her no rights in the personal property of the husband. It is a nude pact.

See:

> Williston on Contracts (Revised Edition) sections 13, page 21; 102a; 104, 141;

Komp v. *Raymond*, 175 N. Y. 102, 107, 108;
Grossman v. *Schenker*, 206 N. Y. 466, 468;
Moran v. *Standard Oil Company*, 211 N. Y. 187, 197, 198;
DeCicco v. *Schweizer*, 221 N. Y. 431, 433, 435;
Wood v. *Duff-Gordon*, 222 N. Y. 88, 91, 92;
Schlegel Mfg. Co. v. *Cooper's Glue Factory*, 231 N. Y. 459, 461;
McGovern v. *City of New York*, 234 N. Y. 377, 388, 389, 390;
Beck v. *Sheldon*, 259 N. Y. 208, 211;
Nassau Supply Co. Inc. v. *Ice Service Co. Inc.*, 226 App. Div. 368, 370; affd. 252 N. Y. 277.

(f)

The appellants contend that the husband acquired by the instrument "the right to prevent Mrs. McGlone from claiming a part of his estate upon his death" (Brief, pages 30, 31) under the existing law which could not be destroyed by the subsequent legislation, without violating the contract clause of the Federal Constitution. The trouble with that contention is that the wife had no rights in the personal property of her husband under the existing law, arising from the marriage status, which the husband could claim or acquire by contract; her rights were confined to dower [illegible] her husband's real property which the instrument did n[illegible]. Assuming, for the argument, that the husband a[illegible]ed any rights from his wife, which would be protected b[illegible] the Federal Constitution, they must have been such as would vest property rights in him amounting to something more than mere expectations or possibilities, and such as had become ripened into title, legal or equitable, to the present or future enjoyment of property.

Baker's Executors v. *Kilgore*, 145 U. S. 487, 489;
People ex rel. Eitel v. *Lindheimer*, 371 Ill. 367 (The appeal to this court was dismissed in 308 U. S. 505).

(g)

The appellants flatly denominate the instrument an ante-nuptial contract by which the husband acquired vested rights, without showing in the slightest degree that the instrument embraces the essentials of a valid ante-nuptial contract. They say that the consideration for it was the marriage of the parties. The instrument shows on its face that, at its date, the parties had agreed to marry and had fixed the date for the ceremony of marriage. It fails to show that the parties viewed or intended the subsequent marriage as consideration for the making of it, and no such inference can be drawn from it. There is no evidence in the record that the parties viewed or intended that the marriage should be the consideration for the making of the instrument.

> "Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing' (Holmes, Common Law, p. 292; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 579). Nothing is consideration that is not regarded as such by both parties (*Philpot* v. *Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn.* v. *Wickham*, *supra*)." (Opinion by Cardozo, *J.*, in *DeCicco* v. *Schweizer*, 221 N. Y. 431, 438.)

Blanshan v. *Russell*, 32 App. Div. 103, 104; affirmed on opinion below in 161 N. Y. 629;
Cloyes v. *Cloyes*, 36 Hun (N. Y.) 145, 146;
Carpenter v. *Taylor*, 164 N. Y. 171, 177

An ante-nuptial contract, in the common and legal acceptation of the term, is one by which a prospective husband and a prospective wife mutually agree upon the settlement of their mutual property rights in the estates of each other, particularly the rights of dower and curtesy, and makes provision for the parties after death, or provides for mutual releases of rights in their respective estates.

Curry v. *Curry*, 10 Hun (N. Y.) 366, 368-369;
Pierce v. *Pierce*, 71 N. Y. 154, 157;

Matter of Young, 27 Hun 54; affd. 92 N. Y. 235;
Johnston v. *Spicer*, 107 N. Y. 185, 189, 191;
Graham v. *Graham*, 67 Hun 329, 332-333; affd. 143 N. Y. 573 (The report of the case at the General Term sets forth the agreement in full);
Matter of Stilson, 85 App. Div. (N. Y.) 132, which states in full the agreement of the parties.

(h)

The Appellate Division in its opinion herein (R., 42, 44, 46, 47) also denominated the instrument an ante-nuptial contract, and held that its introduction in evidence made a *prima facie* case for the petitioners in the absence of any evidence on behalf of the widow. It held that the "unilateral agreement" was sufficient because it had been acted upon by the prospective husband. It held that "when that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights." The court stated that "the instrument was valid under the pre-existing statutes (Dom. Rel. Law, sec. 53; Pers. Prop. Law, sec. 31, subd. 3)." The court further stated: "This vesting accrued before the enactment of subdivision 9 of section 18 of the Decedent Estate Law (added by Laws of 1929, chap. 229, and amd. by Laws of 1930, chap. 174). The subsequent enactment, therefore, violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; State Const., art. 1, sec. 6). By the former the State is forbidden to pass any law impairing the obligation of contracts, and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid (citing cases)." The court held that the saving clause contained in subdivision 9 was valid, upon deletion therefrom of the words "so executed," which deletion really deletes the words "duly acknowledged" from an instrument executed prior to the enactment of the statute. The court further stated: "This leaves one further question—that of consideration. The February 2, 1922 instrument had a valid

consideration. The marriage constituted that consideration. It has long been recognized as 'among the highest consideration known to the law' (citing cases). Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator." The opinion does not indicate in what respect the prospective husband acted upon the instrument, or what were the "certain contract rights" which "vested" in the husband under it, or what rights in the property of the husband the wife acquired, which she could renounce or waive. All the cases cited by the court to the effect that the marriage was the consideration for the alleged contract clearly show that the promise to marry the prospective husband was the consideration for the transfer of property to her, or other provision made for her; and the subsequent marriage was only in fulfillment of the promise to marry upon the conditions attached to the promise. There is no evidence in the record here that the making of the instrument in question was based or conditioned upon any promise by the prospective husband to marry the prospective wife.

POINT B.

THE MERE INTRODUCTION IN EVIDENCE BY THE PETITIONERS OF THE INSTRUMENT OF FEBRUARY 2, 1922, AND THE MARRIAGE CERTIFICATE, AND THE STIPULATION AMENDING THE ANSWER TO THE PETITION WHICH ADMITTED THE MAKING AND DELIVERY OF THE INSTRUMENT, DID NOT MAKE OUT A PRIMA FACIE CASE FOR THE PETITIONERS. THE PETITIONERS DID NOT MAKE OUT SUCH A CASE AS WOULD SHIFT THE BURDEN OF PROOF TO THE WIDOW.

The appellants have contended from the beginning, and the Appellate Division held, "that the unchallenged proof that this instrument was genuine was sufficient to establish

prima facie that it was binding upon the widow (*Pimpinello* v. *Swift & Co.*, 253 N. Y. 159, 162; *Matter of Stone*, 272 id., 121, 124)." The Appellate Division also held that the "widow in seeking to repudiate her solemn writing was not aided by or armed with a presumption of inequality (*LaTourette* v. *LaTourette*, 54 App. Div. 137, 138), in the absence of some proof casting suspicion upon or tending to vitiate the instrument."

In both the *Pimpinello* and *Stone* cases the transactions were not between prospective wife and prospective husband, or between husband and wife, but between strangers. The doctrine that ordinarily "the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby," though his mind never gave assent to the promise expressed therein, is applicable only to strangers, dealing on equal terms, and is not applicable to the relationship existing between a prospective wife and a prospective husband, or between husband and wife (*Pierce* v. *Pierce*, 71 N. Y. 154, 159; *Hutchinson* v. *Ross*, 262 N. Y. 381, 400; *Matter of Smith*, 243 App. Div. 348, 352, 354; *Peyton* v. *William C. Peyton Corp.*, 7 Atl. Rep. (2d) 737). In the *LaTourette* case, the plaintiff husband brought an action against his wife seeking to avoid transfers and conveyances made by him to her on the ground of fraud, and the court held that the husband was not armed with any presumption of inequality arising from the relationship of husband and wife, and that the "law does not presume that the head of a family is dominated by the wife, and hence it follows in this case that the alleged fraud must be proved."

The instrument here in question, on its face, is utterly lacking in the expression of any consideration for the making of it by the prospective wife, and under such circumstances it does not *prima facie* establish a case for the petitioners. Even between strangers the instrument itself would not be held to be a valid obligation without proof of consideration.

The relationship created between prospective husband and prospective wife being of a fiduciary character and involving

mutual confidence and frankness to a high degree, any agreement of an ante-nuptial nature made by them must be based upon fair dealing and good faith. When it appears that the provision made for the wife is "inequitable, unjust and unreasonably disproportionate to the means" of the prospective husband every presumption is raised against the validity of the alleged agreement, and the courts require strict proof of fairness when called upon to enforce it against the prospective wife; "and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement."

Pierce v *Pierce*, 71 N. Y. 154, 157, 158;
Graham v. *Graham*, 143 N. Y. 573, 577, 580;
Perkins v. *Guaranty Trust Co.*, 274 N. Y. 250, 263, 269;
Lamb v. *Lamb*, 18 App. Div. (N. Y.) 250, 257.

The cases in other jurisdictions are to the same effect:

Juhasz v. *Juhasz*, 134 Ohio State 257 (16 N. E. (2d) 328);
Denison v. *Dawes*, 121 Me. 402 (117 Atl. 314) (citing the *Pierce* and *Graham* cases);
Jones v. *McGonigle*, 327 Mo. 457 (37 S. W. (2d) 892);
Carr v. *Lackland*, 20 S. W. 624 (Missouri) (citing the *Pierce* case);
Stahl v. *Stahl*, 115 Neb. 882 (215 N. W. 131) (citing the *Pierce* case);
DeBolt v. *Blackburn*, 328 Ill. 420 (159 N. E. 790);
Brown v. *Brown*, 329 Ill. 198 (160 N. E. 149);
Taylor v. *Taylor*, 144 Ill. 436 (33 N. E. 532) (citing the *Pierce* case);
Peyton v. *William C. Peyton Corp.*, 123 Atl. 1482 (Delaware);
Merchants' National Bank of Mobile v. *Hubbard*, 222 Ala. 518.

We respectfully submit that the instrument in question shows on its face evidence of lack of consideration, inequality, overreaching and unfairness, particularly when consid-

ration is given to the quantum of the estate left by the husband, namely, $236,852.72. That in itself is the affirmative proof of inequality and overreaching on the part of the prospective husband, if such affirmative proof were necessary, and is the "vitiating element, even though slight" which subjects the document to "searching scrutiny." As stated by the learned Surrogate:

> "Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration, of rights of inheritance worth $116,426.37. If this demonstration is not a *prima facie* sufficient indication of inequality and overreaching on the part of the prospective husband to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (*Pierce* v. *Pierce*, 71 N. Y. 154, 158; *Graham* v. *Graham*, 143 N. Y. 573, 580), it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity" (R., 32).

It was not necessary that the surviving spouse should affirmatively prove any overreaching or deception on the part of her deceased husband in obtaining the execution of the instrument in question by her, as they were under the confidential relationship of prospective husband and prospective wife. The cases in which such a relationship exists form an exception to the rule in ordinary cases that overreaching and deception must be proven by the party making such claim. In *Boyd* v. *De La Montagnie*, 73 N. Y. 498, which was an action by the executors of the deceased wife to set aside a gratuitous transfer of property made by her to her husband, the Court stated at page 502:

"It is not found that the defendant acted with a fraudulent intent in procuring the transfer, but I do not understand that this is necessary to be affirmatively shown in this class of cases. A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a relation to the wife, and the equitable principles referred to would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in ordinary business transactions, which the wife may legally engage in. When this relation exists the person obtaining the benefit must show by the clearest evidence, that the gift was freely and deliberately made. The burden is upon the person taking the gift to show that the transaction was fair and proper (citing cases)."

See, also:

Pomeroy, Equity Jurisprudence (4th Ed.) sections 955-957, 963.

Furthermore, the petitioners assumed and took the initiative in seeking a determination of the validity of the right of election exercised by the widow, and the burden of proof thus rested upon them to establish that the decedent's widow had waived her right to so elect.

Matter of Rechtschaffen, 278 N. Y. 336, 338;
Matter of Maiden, 284 N. Y. 429, 431;
Matter of Green, 155 Misc. (N. Y.) 641, 649; aff'd. 246 App. Div. 583.

The petition herein alleges (R., 10, 11) that the instrument in question was made "in contemplation and in consideration of marriage," and "for other good and valuable consideration"; and that "said Helena Day Snyder had full knowledge of the nature, terms, and effect thereof," at the time of its execution and delivery. Petitioners gave no evidence as to such allegations, which were denied by the answer (R., 17).

The appellants have made a point that the widow did not testify in her own behalf as to the making of the instrument and the negotiations leading to its execution. She was incompetent to so testify, in the absence of any evidence by the appellants as to the personal transaction involved in the instrument (N. Y. Civil Practice Act, sec. 347).

CONCLUSION.

We respectfully submit that the appeal should be dismissed for lack of jurisdiction in this court; or that the judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals should be affirmed.

Respectfully submitted,

ANDREW F. VAN THUN, JR.,
Attorney for Appellee,
Chase L. Day, executor, etc.

Andrew F. Van Thun, Jr.,
George H. Burtis,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1941.

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased, et al., Appellants, *vs.* Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased.	Appeal from the Surrogate's Court, Kings County, State of New York.

[January 5, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The federal question presented upon this appeal is whether § 18 of the New York Decedent Estate Law works an impairment of the obligation of contract, forbidden by Article I, Section 10 of the Constitution, or a deprivation of property without due process, forbidden by the Fourteenth Amendment.

The instrument which appellants claim embodies a contract which has been impaired, and under which they claim property rights, reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized."

Appellee's decedent, Helena Day Snyder, who died in the course of this litigation, executed this instrument in London two days before her marriage to John J. McGlone, appellants' decedent.

The laws of New York at the time gave to a widow dower rights in her husband's real estate, but, except for restrictions on charitable gifts not involved here, left him otherwise free to make testamentary disposition of all his property to strangers.

On August 21, 1930, McGlone executed a will, one clause of which recited Helena's waiver but "nevertheless" made a bequest of $2,000 to her as a "slight token" of his affection and admiration. The legislation complained of, giving a testator's surviving spouse a right of election to take against the will, had been enacted as § 18 of the Decedent Estate Law on March 29, 1929, but it could not become effective until September 1, 1930, a few days after McGlone executed his will.[1] It permitted waiver by a spouse or prospective spouse of the protection thus afforded, but in order to be effective the waiver was required to be "by an instrument subscribed and duly acknowledged."[2] The instrument signed by Helena was not acknowledged, and the new legislation was limited in operation to wills executed after its effective date.

McGlone so acted as to bring his estate under this new legislation. On July 6, 1934, he executed a codicil to his will which, although it did not disturb the provision made for his wife in his earlier will, had the effect of bringing the entire will, modified and re-

[1] Section 18-1 of the Decedent Estate Law, enacted by N. Y. Laws of 1929, c. 229, § 4, provided:

"Where a testator dies after August thirty-first, nineteen hundred and thirty, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section."

Section 18-1(f) provided:

"Where the aggregate of the provisions under the will for the benefit of the surviving spouse including the principal of a trust, or a legacy or devise, or any other form of testamentary provision, is less than the intestate share, the surviving spouse shall have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."

[2] Section 18-9 read as follows:

"The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement of settlement so executed, made before or after marriage."

In the following year the words "of settlement" were deleted from this provision, and the following sentence was added: "An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section." N. Y. Laws of 1930, c. 174, § 1.

published, within the provisions of the new law[3] and thus, according to the terms of § 18, of giving her a right of election to take under the statute and against the will.

Helena sought to exercise this right, and thus precipitated the present litigation, in which the quoted instrument was pleaded as a bar to the right. The Surrogate held that the instrument was not a contract; the Appellate Division held that it was; and the New York Court of Appeals assumed, without deciding, that apart from the effect of § 18 of the Decedent Estate Law, it was a binding contract, validly executed, and entitled to the protection of the Constitutional provisions here invoked. The Court of Appeals held, however, that "A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver." Section 18 was held to confer a right of election upon Helena, and to be consistent with the requirements of the contract and due process clauses of the Federal Constitution. *Matter of McGlone*, 284 N. Y. 527; 533.

The reluctance of the New York Court of Appeals to decide the question whether the instrument in question did constitute a contract is quite understandable upon consideration of the record made up in this case. It appears from the face of the instrument that it was penned on stationery of the Savoi Hotel, London, by an unidentified scribe, and that the only signature was Helena's. The instrument does not recite mutuality of agreement. It recites no consideration, and none is proved. It rather negatives the receipt of consideration and the likelihood that marriage was such by indicating that the parties had already exchanged promises to marry. Nor is there anything in text or context to help identify the source of the rights said to be waived. No circumstances are adduced to show that either of the parties, about to marry in a foreign land, then had New York as a domicile or was contracting with reference to its laws, either present or future. The marriage record in evidence shows that his "residence at the time of marriage" was "Savoy Hotel, London" and hers was "The Beverleys, Thornbury Road, Isleworth." If either was domiciled elsewhere, there is nothing to indicate it. There is not even any showing that at the time either of the parties owned or had any expectation of owning

[3] Decedent Estate Laws, § 2.

property in New York. No apparent heed has been given to the usual rule that the law of the place of contracting determines questions of form, capacity to contract, necessity of consideration, and some aspects of the duty of performance. Both sides seem to have assumed, but for reasons that are not revealed, that the law of New York governs these questions. The niggardliness of the record may be due in some part to the restriction imposed on the right of a survivor to testify by § 347 of the New York Civil Practice Act, but this does not warrant an ill-informed guess by this Court as to the existence of a contract or its meaning under properly applicable rules of law.

When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court. *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79, 86-87; *Coolidge* v. *Long*, 282 U. S. 582, 597; *U. S. Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236; *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538. In any view we might take of the constitutional questions urged here we should not regard this record as an adequate basis for invalidating a state statute. But, lest a decision on this ground be taken as an invitation to further litigation in the New York courts and in this Court, we shall emulate the generosity shown by the Court of Appeals to the appellants and adopt its assumption as to the existence and nature of the contract for the purpose of disposing of the other questions urged.

Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima*, 8 How. 490; *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; cf. *Randall* v. *Kreiger*, 23 Wall. 137, 148. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person. Appellants cannot successfully attack the constitutionality of the new legis-

lation which went into effect before McGlone's death, and became operative only as the result of his own voluntary act.

McGlone was free to consent to a cancellation or revocation of Helena's waiver, or to make a valid bequest to her of all or any of his property despite it. Further, he could free her of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. This is what he did by executing the codicil of July 6, 1934, voluntarily taking advantage of the privilege of further testamentary disposition offered by the laws of New York. So long as McGlone stood on the will made before the effective date of the legislation, the law allowed him to avail himself of the full force and effect of the waiver. Given his choice between adhering to any will made before September 1, 1930, or of bringing his estate under the new law, McGlone saw fit to execute a further testamentary document after that date and thus to bring the new legislation into operation as to himself, his estate and survivors. For the purpose of considering the application of the contract and due process clauses of the Federal Constitution, the case is as if he had made a voluntary legacy to his wife despite her waiver. If the obligation of the waiver suffered impairment, it was only because he exercised further testamentary privileges with a condition attached, and thereby brought those consequences unwittingly or intentionally upon himself and his estate.

The condition clearly was such as New York might without restraint from the Federal Constitution annex to the privilege of making a will under its law. Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life,[4] unless they had been waived with required formality. The State could have conditioned any further exercise of testamentary power upon giving a right of election to the surviving spouse regardless of any waiver, however formally executed; and having

[4] The Court of Appeals has said of this legislation:

"After September 1, 1930, the absence of protection to the widow under prior laws gave way to the widow's right of election to take a specific part of the estate against the will. The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases." Matter of Greenberg, 261 N. Y. 474, 478.

When it enacted § 18 of the Decedent Estate Law, New York at the same time abolished for the future the ancient estates and rights of dower and curtsey, and made important changes in the rules as to descent and distribution of property.

recognized the binding effect of a waiver, it could condition that recognition upon acknowledgment, which was no doubt considered a desirable safeguard against casual, informal, or ill-considered abandonment of statutory protection, as well as against overreaching or fraud.

Affirmed.

Mr. Justice ROBERTS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.